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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation

Case No. 4:11-cv-06714-YGR

Donald R. Cameron, et al.,

Case No. 4:19-cv-03074-YGR

Plaintiffs,

**DEFENDANT APPLE INC.'S NOTICE OF
MOTION AND MOTION TO COMPEL
PLAINTIFFS TO SUBMIT TRIAL PLAN;
MEMORANDUM OF POINTS AND
AUTHORITIES**

v.

Apple Inc.,

Defendant.

The Honorable Yvonne Gonzalez Rogers

Date: Nov. 16, 2021

Time: 10:00 a.m.

Courtroom: 1, 4th Floor

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 16, 2021 at 10:00 a.m. before the Honorable
3 Yvonne Gonzalez Rogers, in Courtroom 1 of the United States District Court, Northern District of
4 California, located at 1301 Clay Street, Oakland, CA 94612, Defendant Apple Inc. will and hereby
5 does move this Court to compel the named plaintiffs in *In re Apple iPhone Antitrust Litigation*, 4:11-
6 cv-06714 (N.D. Cal.), and *Cameron v. Apple Inc.*, No. 4:19-cv-03074 (N.D. Cal.), to submit a joint
7 trial plan. Apple respectfully submits that in light of the Supreme Court's decision in *Apple Inc.*
8 *v. Pepper*, 139 S. Ct. 1514 (2019), and the subsequent attempt by both sets of proposed class
9 representatives to seek overlapping relief, a trial plan is necessary in these cases to inform Apple, this
10 Court, and the absent would-be class members how the causes of action asserted in the two actions
11 could fairly and efficiently be tried to judgment.

12 This motion is based on this Notice of Motion and Motion, the concurrently filed Memorandum
13 of Points and Authorities, the pleadings and papers on file, and any argument received by the Court.

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INTRODUCTION

In *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019), all nine Justices recognized that Apple should not be subjected to duplicative liability for the conduct at issue in these cases. The five-Justice majority explained that parallel litigation by consumers and developers could proceed if (and only if) they sought non-overlapping damages. The majority even laid out a path for them to follow: Developers could seek “lost profits” under a monopsony theory while consumers could continue to seek “the difference between the price they paid and the competitive price” under a monopoly theory. The four-Justice dissent explained the consequences of failing to follow the majority’s roadmap, including the likely necessity of joinder. No Justice suggested that consumers and developers could seek or obtain duplicative relief, or refuse to coordinate with one another.

Unfortunately, the named plaintiffs in these two cases failed to adhere to the course laid out in *Pepper*. Rather than pursuing non-overlapping damages, both sets of plaintiffs now seek to recover the identical “overcharge” that Apple allegedly received by virtue of its 30% commission. Developer Plaintiffs seek 100% of any alleged overcharge while Consumer Plaintiffs seek 82% of that *same* overcharge, meaning that they collectively are asking this Court to order Apple to pay **182%** of the supposed “damages”—before trebling under the Sherman Act.

As Consumer Plaintiffs’ expert admitted, the two plaintiff groups made no effort to coordinate with one another notwithstanding the Supreme Court’s decision in *Pepper*: “*If these cases were consolidated, for example, and . . . the plaintiffs on both ends decided to work out jointly, how any damages were to be divided, I don’t have an opinion on how that would work out.*” McFadden Dep. (Perry Decl. Ex. A) 239:22-240:1. But any certification order in these cases “must define the class and the class claims, issues, or defenses,” Fed. R. Civ. P. 23(c)(1)(B), including whether and how the cases could fairly be tried to judgment before a jury (or juries). Plaintiffs should be required to address these issues *before* the Court rules on their respective motions for class certification. Apple respectfully submits that the Court cannot, and should not, certify any class or subclass without requiring plaintiffs to submit a workable trial plan (although it could deny certification without requiring such a plan, or because of the absence of such a plan). Accordingly, plaintiffs should be ordered to submit a joint trial plan.

RELEVANT BACKGROUND

Consumer Plaintiffs filed this action in 2011, and their operative complaint alleges that they have been “forced to pay suprareactive prices for apps.” *In re Apple Antitrust Litig.*, No. 4:11-cv-06714-YGR, Dkt. 229 Ex. A ¶ 81 (N.D. Cal. Sept. 17, 2020). Their expert, Professor Daniel McFadden, acknowledges the need to allocate Apple’s alleged overcharge as damages between the two plaintiff groups—he “estimate[s] that 81.8 percent of the excessive App Store commission from the Games category was borne by the Consumer Class, while the other 18.2 percent was borne by app developers.” *In re Apple*, Dkt. 442-11 ¶ 235. He estimates a substantially similar allocation for the Entertainment and Music categories (*id.* ¶ 238), although he ignores all the other categories of apps on the App Store.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court held that a federal antitrust defendant may not rely on a “pass on” defense. Later, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court held that “indirect purchasers” could not rely on an offensive “pass on” theory because “potential plaintiffs at each level in the distribution chain” could “assert conflicting claims to a common fund the amount of the alleged overcharge by contending that the entire overcharge was absorbed at that particular level in the chain.” *Id.* at 737.

In 2013, this Court concluded that Consumer Plaintiffs were “indirect purchasers” under *Illinois Brick* and thus dismissed their complaint for lack of standing. *In re Apple Antitrust Litig.*, 2013 WL 6253147 (N.D. Cal. Dec. 2, 2013). A five-Justice majority of the Supreme Court disagreed, holding that Consumer Plaintiffs are “direct purchasers” and thus have antitrust standing. *Pepper*, 139 S. Ct. at 1519. The majority did “not assess the merits of the plaintiffs’ antitrust claims against Apple” or “consider any other defenses Apple might have.” *Id.*

The *Pepper* majority recognized that “Apple’s alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs” because “[a] retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer’s unlawful conduct affects both the downstream and upstream markets.” *Id.* at 1525. According to the majority:

1 Here, some downstream iPhone consumers have sued Apple on a **monopoly** theory.
 2 And it could be that some upstream app developers will also sue Apple on a **monopsony**
 3 theory. **In this instance, the two suits would rely on fundamentally different**
 4 **theories of harm and would not assert dueling claims to a “common fund,” as that**
 5 **term was used in Illinois Brick.** The consumers seek damages based on the
 difference between the price they paid and the competitive price. The app
 developers would seek lost profits that they could have earned in a competitive
 retail market. *Illinois Brick* does not bar either category of suit.

6 *Id.* (emphasis added). At the same time, the majority recognized the possibility that Consumer
 7 Plaintiffs' damages would be zero if Apple's “conduct has not caused the consumer to pay a higher-
 8 than-competitive price” because, for example, “consumers would pay the same retail price regardless
 9 of whether Apple's commission was 10 percent or 30 percent.” *Id.* at 1523.

10 Justice Gorsuch—joined by Chief Justice Roberts and Justices Thomas and Alito—dissented,
 11 writing that consumers were indirect purchasers asserting the type of pass-on theory that *Illinois Brick*
 12 prohibits. As relevant here, Justice Gorsuch wrote:

13 Plaintiffs' claims will also necessitate “massive efforts to apportion the recovery among
 14 all potential plaintiffs that could have absorbed part of the overcharge,” including both
 15 consumers and app developers. *Illinois Brick*, 431 U.S. at 737. If, as plaintiffs contend,
 16 Apple's 30% commission is a monopolistic overcharge, then the app developers have a
 17 claim against Apple to recover whatever portion of the commission they did not pass on
 18 to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing
 19 its liability to the developers by arguing that they had passed on the overcharge to
 20 consumers. **But the Court's holding that *Illinois Brick* doesn't govern this situation**
 21 **surely must mean *Hanover Shoe* doesn't either.** So courts will have to divvy up the
 22 commissions Apple collected between the developers and the consumers. To do
 23 that, they'll have to figure out which party bore what portion of the overcharge in
 24 every purchase. And if the developers bring suit separately from the consumers,
 25 Apple might be at risk of duplicative damages awards totaling more than the full
 26 amount it collected in commissions. To avoid that possibility, it may turn out that
 27 the developers are necessary parties who will have to be joined in the plaintiffs'
 28 lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); *Illinois Brick*, 431 U.S. at 739
 (explaining that “[t]hese absent potential claimants would seem to fit the classic
 definition of ‘necessary parties,’ for purposes of compulsory joinder”).

24 The Court denies that allowing both consumers and developers to sue over the same
 25 allegedly unlawful commission will “result in ‘conflicting claims to a common fund’”
 26 as *Illinois Brick* feared. *Ante*, at 1527. **But Apple charged only one commission on**
 27 **each sale. So even assuming for argument's sake that the 30% commission was**
 28 **entirely illegal, Apple can only be required to pay out in damages, at most, the full**
amount it received in commissions. To their credit, even plaintiffs have conceded as
 much, acknowledging that because “there is only one 30% markup,” any claim by the

1 developers against Apple would necessarily be seeking “a piece of the same 30% pie.”
 2 Brief in Opposition 12.

3 *Id.* at 1529 & n.3 (Gorsuch, J., dissenting).

4 Both the majority and the dissent in *Pepper*, therefore, anticipated that to the extent Consumer
 5 and Developer Plaintiffs both sued for damages, they would use different (and non-overlapping)
 6 measures. The majority proceeded from the assumption that Apple would not be exposed to duplicative
 7 liability because the Developer Plaintiffs would pursue a monopsony theory and “would seek lost
 8 profits” rather than “the difference between the price they paid and the competitive price,” which the
 9 Consumer Plaintiffs already were seeking. 139 S. Ct. at 1525. And Justice Gorsuch’s dissent explained
 10 that if Developer Plaintiffs filed their own lawsuit seeking overlapping relief with the Consumer
 11 Plaintiffs, joinder under Rule 19 might be required to prevent duplicative liability. *Id.* at 1529 & n.3.

12 Shortly after *Pepper* was decided, the Developer Plaintiffs sued Apple. *See Cameron v. Apple*
 13 *Inc.*, No. 4:19-cv-03074 (N.D. Cal.). Despite the *Pepper* majority’s express expectation, Developer
 14 Plaintiffs do *not* now rely on a monopsony theory and do *not* seek lost profits. Instead, their requested
 15 relief overlaps and competes with the Consumer Plaintiffs’ requested relief—something Consumer
 16 Plaintiffs’ expert acknowledges. *In re Apple*, Dkt. 442-11 ¶ 235. Developer Plaintiffs’ expert,
 17 Dr. Nicholas Economides, opines that Developer Plaintiffs’ “damages are equal to the difference
 18 between actual commission rates paid and but-for commission rates.” *Cameron*, Dkt. 332-1 ¶ 75.
 19 However, unlike Consumer Plaintiffs, Developer Plaintiffs do not acknowledge the need to allocate
 20 any overcharges between themselves and Consumer Plaintiffs. Developer Plaintiffs now take the
 21 position that the pass-through rate is 0%, so that they can keep the entire alleged overcharge. (In
 22 contrast, Epic’s expert opined that the pass-through rate was 50%. *See Epic Games, Inc. v. Apple Inc.*,
 23 No. 20-CV-05640, Dkt. 777-3 ¶ 187 (N.D. Cal. May 28, 2021).)

24 On June 1, 2021, both Consumer and Developer Plaintiffs moved for class certification in their
 25 separate lawsuits. *In re Apple*, Dkt. 441; *Cameron*, Dkt. 332. Notwithstanding the clear directives of
 26 *Pepper*, neither plaintiff group grappled with the overlap in their requested relief or sought to join the
 27 other in their respective lawsuit. Moreover, and even though the *Epic* trial showed that further

1 proceedings will be highly complex, neither Consumer Plaintiffs nor Developer Plaintiffs submitted a
 2 trial plan. Apple respectfully submits that they should be ordered to rectify that deficiency.

3 **LEGAL STANDARD**

4 Rule 23 requires that, if the Court certifies a class, its certification order “*must* define the class
 5 and the class claims, issues, or defenses.” Fed. R. Civ. P. 23(c)(1)(B) (emphasis added). Inherent in
 6 that requirement is consideration of how a trial on those “claims, issues, or defenses” would be
 7 conducted, including assurance that such a classwide adjudication will not abrogate substantive or
 8 procedural rights of any party. *See Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d
 9 179, 186 (3d Cir. 2006) (class certification order must provide a “full and clear articulation of the
 10 litigation’s contours at the time of class certification”). Indeed, Rule 23(c)(1)(B) was added to reflect
 11 the practice of “[a]n increasing number of courts requir[ing] a party requesting class certification to
 12 present a ‘trial plan’ that describes the issues likely to be presented at trial and tests whether they are
 13 susceptible of class-wide proof.” Fed. R. Civ. P. 23 Advisory Committee’s note (2003). As many
 14 courts have recognized, requiring a “specific plan for litigating the case” is “a reasonable request.”
 15 *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013); *Ross v. RBS Citizens, N.A.*,
 16 667 F.3d 900, 905 (7th Cir. 2012) (“The justification for a clear trial plan applies with equal force to
 17 subsection (c)(1)(B)” because “there is a critical need to define the class, claims, issues, and defenses
 18 so the parties can adequately prepare for trial”), *vacated on other grounds*, 133 S. Ct. 1722 (2013).

19 The Ninth Circuit repeatedly has considered plaintiffs’ production (or non-production) of a
 20 workable trial plan when evaluating the appropriateness of class certification. *See Zinser v. Accufix*
 21 *Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (affirming order denying class certification
 22 because “there was no manageable trial plan adequate to deal with individualized issues”); *Valentino*
 23 *v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (district court abused its discretion by
 24 certifying class without any “showing by Plaintiffs of how the class trial could be conducted”). Other
 25 appellate courts have done the same. *See Wachtel*, 453 F.3d at 186 n.7; *Hohider v. United Parcel Serv.,*
 26 *Inc.*, 574 F.3d 169, 202 (3d Cir. 2009); *Espenscheid*, 705 F.3d at 775; *Vega v. T-Mobile USA, Inc.*, 564
 27 F.3d 1256, 1279 n.20 (11th Cir. 2009); *Duran v. U.S. Bank N.A.*, 59 Cal. 4th 1, 31-32 (2014) (“the
 28

1 court should consider *at the certification stage* whether a trial plan has been developed to address”
 2 certain potential complexities arising in a classwide trial) (emphasis in original).

3 Although a trial plan might not be required in all cases, *Chamberlain v. Ford Motor Co.*, 402
 4 F.3d 952, 961 n.4 (9th Cir. 2005), district courts in this Circuit have ordered trial plans where warranted.
 5 *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 552 (C.D. Cal. 2012) (ordering plaintiffs to
 6 “articulate[] a workable trial plan”); *Sweet v. Pfizer*, 232 F.R.D. 360, 370 (C.D. Cal. 2005) (plaintiffs
 7 “fail[ed] to comply with the federal rules” by not filing “information regarding a trial plan”); *cf.*
 8 *O’Connor v. Uber Techs., Inc.*, 2015 WL 5138097, at *15 n.13 (N.D. Cal. Sept. 1, 2015), *rev’d on*
 9 *other grounds*, 904 F.3d 1087 (9th Cir. 2018). Moreover, district courts in this Circuit have denied
 10 certification for failure to submit a trial plan. *See, e.g., Badella v. Deniro Mkt’g LLC*, 2011 WL
 11 5358400, at *1 (N.D. Cal. Nov. 4, 2011); *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 487 (C.D.
 12 Cal. 2008) (decertifying a class and finding that a party has a “responsibilit[y] to articulate a clear trial
 13 plan when requested”); *In re Paxil Litig.*, 212 F.R.D. 539, 544 (C.D. Cal. 2003) (plaintiffs “failed to
 14 demonstrate that a manageable trial plan exist[ed] that would make a class action lawsuit feasible”).

15 ARGUMENT

16 Both sets of named plaintiffs have failed, or refused, to abide by the Supreme Court’s ruling in
 17 *Pepper*. They chose not to seek non-overlapping damages, and they have not even tried to coordinate
 18 with one another or requested joinder. Rather, they seek to recover the same alleged overcharges for
 19 the same alleged conduct while advancing fundamentally contradictory estimates of developer pass-
 20 through (with different experts now estimating 0%, 50%, and 82%) without acknowledging that their
 21 approaches, if allowed to proceed, would unconstitutionally subject Apple to duplicative damages.
 22 They have put this Court (and the absent would-be class members) in an untenable position by seeking
 23 certification of claims that cannot be tried consistent with the procedural and substantive protections to
 24 which Apple is statutorily and constitutionally entitled. Accordingly, Consumer Plaintiffs and
 25 Developer Plaintiffs should be compelled to file a joint trial plan *before* the Court rules on the
 26 certification motions.

27 It cannot be disputed that the two plaintiff groups seek overlapping damage awards. They both
 28 posit that Apple’s commission was supracompetitive, and resulted in an “overcharge” in app pricing;

1 but they disagree on whether or not this supposed overcharge was passed through to consumers.
 2 According to Consumer Plaintiffs' expert, developers would pass through 82% of any overcharge to
 3 consumers. *In re Apple*, Dkt. 442-11 ¶ 235. Developer Plaintiffs' expert, on the other hand, opines
 4 that the pass-through rate is 0%. *Cameron*, Dkt. 332-1 ¶ 75. These pass-through figures ignore or
 5 mask the variability among apps, developers, and consumers—pass-through is a highly individualized
 6 issue that cannot be proved with common evidence, and neither plaintiff group has even attempted to
 7 do so. Moreover, even taking plaintiffs' pass-through estimates on their own terms, they *cannot both*
 8 *be correct*, and neither squares with the 50% assumption advanced by Epic's expert. Yet Apple is
 9 being sued for *billions* of dollars based on such wildly diverging assumptions; and worse, Apple could
 10 be subject to duplicative damages, particularly if the two trials are conducted consecutively rather than
 11 simultaneously. See Oct. 7, 2019 Hearing Tr. (Perry Decl. Ex. D) 32:11-23 (indicating that trials would
 12 be consecutive).

13 Given the clarity of the *Pepper* decision, the Court should have expected that the experienced
 14 and well-represented plaintiff groups would have acknowledged the problems presented by their
 15 decision to seek duplicative damages, and at least attempted to offer a solution. But they didn't. This
 16 point was highlighted during the deposition of Professor McFadden:

17 Q. If a particular methodology for ascertaining the incidence of the alleged
 18 excessive commission were to overstate damages to one group, whether
 19 developers or consumers, it would necessarily result in understating damages
 for the other group, would it not?

20 A. If one had a consolidated legal case in which both developers and consumers
 21 were in the same case and the judge were making this determination, I would
 22 anticipate the answer would be yes. If, as in the real world, developer
 23 actions and consumer actions are separate and perhaps not necessarily subject
 to the same legal precedents and – who knows how it would work out. ***That's***
a mare's nest for lawyers to entertain themselves with.

24 McFadden Dep. (Perry Decl. Ex. A) 234:7-235:1 (emphasis added). As the proponents of class
 25 certification, it was (and remains) the obligation of Consumer Plaintiffs and Developer Plaintiffs to
 26 resolve these issues *before* any classes are certified.

27 To be sure, the two plaintiff groups can be expected to argue that they are not seeking
 28 overlapping damages because their respective experts have constructed “but-for worlds” that contain

1 different factual assumptions. For example, Developer Plaintiffs apparently contend that Apple's price
 2 tiers would remain the same in the but-for world (*see Elhauge Dep.* (Perry Decl. Ex. B) 247:1-15),
 3 while Consumer Plaintiffs contend that price tiers would be different in the but-for world (*see In re*
 4 *Apple*, Dkt. 442-11 ¶ 162 (McFadden Report)). But that magnifies the problem, rather than
 5 ameliorating it; if they are each allowed to construct their own but-for worlds, presumably using
 6 assumptions that maximize recovery for their respective constituencies, the possibility of duplicative
 7 recovery only increases. Apple gets it coming and going, while neither plaintiff group is forced to
 8 coordinate with the other. Nor is it any answer to say (as Developer Plaintiffs might) that seeking
 9 100% of the alleged overcharge is "conservative" because a lost profits measure would be even higher.
 10 *See Cameron*, Dkt. 332-1 ¶ 63 (Economides Report). Developer Plaintiffs have all but abandoned their
 11 monopsony theory (*see Cameron*, Dkt. 332 at 17 n.8; Economides Dep. (Perry Decl. Ex. C) 71:13-17;
 12 Elhauge Dep. (Perry Decl. Ex. B) 169:25-171:14) and have not even attempted to prove lost profits or
 13 any other damages measure based on that theory. Economides Dep. (Perry Decl. Ex. C) 75:18-20 ("I
 14 haven't done that, based on alternative theories of harm"). Instead, they chose—notwithstanding
 15 *Pepper*—to seek the same overcharge as Consumer Plaintiffs. Both plaintiff groups have to confront
 16 the consequences of these decisions. They can't just forge ahead and seek 182% of the alleged
 17 overcharge, yet that is exactly the situation facing Apple (and the Court) today. A mare's nest indeed.

18 For the benefit of Apple, the Court, and members of both putative classes, Consumer and
 19 Developer Plaintiffs should have submitted (and should now be compelled to submit) a joint trial plan
 20 that confronts these issues head-on. Right now, the two classes collectively ask this Court to order
 21 Apple to pay 182% (before trebling) of the alleged overcharge. Yet neither class certification motion
 22 even attempts to explain how that request can be reconciled with the Rules Enabling Act, the Due
 23 Process Clause, or the Seventh Amendment. *See Badella*, 2011 WL 5358400, at *13 (denying class
 24 certification and finding plaintiff's "lack of any suggestions, much less a plan, as to how the Court
 25 should manage this large proposed nationwide class action" to be "troubling," especially in light of
 26 "issues of damages" that were "not addressed by Plaintiffs"). The Court has to consider these
 27 constraints before certifying any class, but plaintiffs have offered no meaningful assistance. A joint
 28 trial plan from plaintiffs is clearly called for in these circumstances.

1 Rules Enabling Act. A trial plan would assist the Court in evaluating, as it must, whether class
 2 certification would abide by “the [Rules Enabling] Act’s mandate that [use of Rule 23] ‘shall not
 3 abridge, enlarge or modify any substantive right.’” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845
 4 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997), and 28 U.S.C. § 2072(b)).
 5 Before certifying a class, a court must ensure that the proposed class action could be tried to verdict
 6 consistent with Rule 23, the Sherman Act, and the Constitution. *See Wal-Mart Stores, Inc. v. Dukes*,
 7 564 U.S. 338, 351-52 (2001). Without understanding the relationship between the relief sought by
 8 each plaintiff group, for example, the Court cannot determine whether either proposed class action
 9 could be tried to judgment before a jury (or juries) without interfering with rights of Apple (and the
 10 absent putative class members) under the Due Process Clause and the Seventh Amendment. If the
 11 Developer Plaintiffs go first and recover 100% of any alleged overcharge, what’s left for the Consumer
 12 Plaintiffs? And if the Consumer Plaintiffs go first and recover 82% of any alleged overcharge, would
 13 Developer Plaintiffs be able to recover more than 18%? Both Apple and the putative class members
 14 need to know the answers to these questions before any class could be certified. *See, e.g., Ortiz*, 527
 15 U.S. at 848 (“due process require[s] that [absent class] members ‘receive notice plus an opportunity to
 16 be heard and participate in the litigation’”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302-03
 17 (7th Cir. 1995) (directing a district court to decertify a class where proposed method of trying the case
 18 would violate the reexamination clause of the Seventh Amendment); Manual for Complex Litigation
 19 (Fourth) § 22.756 (“A trial on general liability can impose unfair burdens on parties forced to litigate
 20 issues out of context.”). Given the failure of both plaintiff groups to engage with these issues, the Rules
 21 Enabling Act precludes certification.

22 Due Process Clause. Under the Due Process Clause, civil defendants have “a right to be
 23 protected against double recoveries . . . because overlapping damage awards violate that sense of
 24 ‘fundamental fairness’ which lies at the heart of constitutional due process.” *In re N. Dist. of Cal.
 25 “Dalkon Shield” IUD Prods. Liability Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *rev’d on other
 26 grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *see also Assoc. Gen.
 27 Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 n.52 (1983) (citing a
 28 federal “policy against duplicative recoveries” and refusing to allow a representative union to sue

1 because the claimed damages might duplicate those of other potential plaintiffs); *Cargill, Inc. v.*
 2 *Monfort of Colo., Inc.*, 479 U.S. 104, 111 n.6 (1986) (relying on the federal policy against multiple
 3 damage recoveries in determining whether a party is a proper plaintiff under Clayton Act); *Atl.*
 4 *Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716 n.4 (4th Cir. 1983) (suggesting that plaintiffs
 5 cannot recover “overlapping and, therefore, probably inconsistent” remedies); *Sanchez v. Martinez*, 54
 6 Cal. App. 5th 535, 546 (2020) (“Double or duplicative recovery for the same items of damage amounts
 7 to overcompensation and is therefore prohibited.”). It would violate Apple’s due process rights to order
 8 it to pay twice for the same alleged conduct under the Sherman Act. At minimum, plaintiffs should be
 9 required to submit a joint trial plan explaining whether and how Apple would be protected against
 10 duplicative damages.

11 Seventh Amendment. Similarly, absent an adequate joint trial plan, Apple’s Seventh
 12 Amendment rights would be jeopardized. For example, if both sets of Plaintiffs plan to submit evidence
 13 to separate juries about their entitlement to a particular amount of any overcharge, that would appear
 14 to violate Apple’s Seventh Amendment rights. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1302-03.
 15 And if Plaintiffs seek to present competing evidence to the *same* jury, how would that happen? Would
 16 Plaintiffs support an instruction to the jury that Apple cannot be subjected to duplicative liability for
 17 any alleged overcharge? Or will one group accede to the other’s estimate regarding pass-through rates?
 18 While they could try to prove that the rate is 82% or 0%, how could they possibly prove that it is both?
 19 Will they choose the 50% rate advanced in *Epic*, even though no expert endorsed that rate at the
 20 certification stage? Did they even try to coordinate to come up with the “right” estimate, or are they
 21 both just seeking to maximize recovery at Apple’s expense? With billions of dollars at stake, these
 22 questions are not academic; and the answers are fundamental to the Rule 23 inquiry, including whether
 23 a class-based trial (or trials) are manageable. Yet, plaintiffs and their experts do not seem to have
 24 considered them—or, if they have, they certainly have not shared their thinking with Apple or the
 25 Court, as required for a class to be certified.

26 All nine Supreme Court Justices in *Pepper* warned the class plaintiffs not to seek overlapping
 27 damages and thus open Apple to duplicative liability. Although the named plaintiffs in both cases have
 28 had years (and the benefit of the *Epic* trial) to plan their legal strategy, they ignored the Supreme Court’s

1 warning and now seek certification of two classes seeking duplicative damages. As a result, they
 2 should be required to explain how their claims could be tried to a jury (or juries) in a way that protects
 3 Apple's procedural and substantive rights. Even if a trial plan might not be required at the certification
 4 stage in every case, Apple respectfully submits that in light of *these* cases' complexities and plaintiffs'
 5 failure to heed the *Pepper* decision, this Court would abuse its discretion if it did not compel plaintiffs
 6 to submit a joint trial plan and permit Apple to respond to it before certifying any class or subclass. Of
 7 course, the Court could deny certification without taking that extra step—or even based on plaintiffs'
 8 failure to submit a trial plan.

9 * * *

10 Apple is making this request for the benefit of the Court and the absent persons and entities
 11 who would be class members as well as to protect its own rights. As Justice Gorsuch's dissent
 12 recognized, "it may turn out that the developers are necessary parties who will have to be joined in the
 13 [consumer] plaintiffs' lawsuit" against Apple under Rule 19. *Pepper*, 139 S. Ct. at 1529. The *Pepper*
 14 majority did not disagree with this point; to the contrary, it made clear that separate, parallel litigation
 15 could proceed only if the two groups of plaintiffs sought different types of damages. Plaintiffs did not
 16 follow the path marked by the *Pepper* majority; yet at the same time, Consumer Plaintiffs have not
 17 sought to join Developer Plaintiffs to their action, or *vice versa*. They were on clear notice of this
 18 problem and have had plenty of time to act. They have therefore made a conscious decision *not* to
 19 pursue joinder, and must live with the consequences of that decision. Although the Rule 19 problem
 20 is not yet ripe, Apple reserves the right to seek all available relief, including dismissal, if any class is
 21 certified.

22 CONCLUSION

23 The Court should compel both Consumer Plaintiffs and Developer Plaintiffs to submit a joint
 24 trial plan to which Apple may respond.

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